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Nos. 83-1377 and 83-1391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LIANE BUIX MCDONALD,
on her own behalf and on behalf
of all others similarly situated,
Petitioner-Cross-Respondent,

v.

UNITED AIR LINES, INC.,
Respondent-Cross-Petitioner,

and

ASSOCIATION OF FLIGHT ATTENDANTS,
and *Respondent,*
JOYCE BARR,
Respondent-Cross-Petitioner.

On Cross-Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF LIANE BUIX McDONALD IN OPPOSITION TO CROSS-PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's prior decision in this case, *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), may individual unnamed members of the class represented by Petitioner be denied relief because each did not file separate timely charges with the Equal Employment Opportunity Commission?

2. Are the District Court's unappealed findings that Petitioner McDonald has vigorously represented a class, and her receiving a part of the relief sought did not show that she had a conflict of interest, clearly erroneous?

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STATEMENT OF FACTS

The cross-petitions of United Air Lines (No. 83-1391) and Joyce Barr (No. 83-1377) are in response to the Petition for Writ of Certiorari filed by Petitioner McDonald

on January 18, 1984 (No. 83-1180). Certain additional facts are necessary to put the issues which the two cross-petitions raise in proper perspective.

I. FACTS PERTINENT TO THE CROSS-PETITION OF UNITED AIR LINES (NO. 83-1391).

Much of the relevant procedural history is summarized in the Opinion of this Court in *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), *affirming Romasanta* v. *United Air Lines, Inc.*, 537 F.2d 915 (7th Cir. 1976), and the Opinion below (United App. 2a-38a).

Essentially, United has succeeded in delaying relief to a substantial class of former flight attendants for more than twelve years since the illegality of United's "no-marriage" rule was established definitively in a related case, *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Among the contentions which United raised in attempting to defeat or limit the class action status of the case was the fact that Petitioner was seeking to represent a class, though she and other individual members had not filed timely individual complaints with the EEOC. It is undisputed that timely complaints with the EEOC had been filed by some of United's flight attendants. *See Sprogis*, 444 F.2d at 1196; and also *McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357, 361 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979). It is likewise undisputed, as set forth in an affidavit of Mrs. McDonald filed in the District Court, she knew and relied upon the fact that other United flight attendants were challenging United's no-marriage rule. *See* 537 F.2d at 919-920. Both the Seventh Circuit and this Court expressly rejected United's position on this issue in prior rounds of this case (537 F.2d at 919, 432 U.S. at 389).

At all times, from the beginning of this action, which was styled a class action by the original plaintiff, United was well aware that it was subject to contentions that class treatment was appropriate. When a motion for

class certification was denied by the District Court in December 1972, the then-class representative applied for an interlocutory appeal, which the District Court had certified, but the Seventh Circuit denied. United therefore was on notice that the issue might be raised at a later stage, in an appeal as of right. When the then-class representative later indicated that she would not appeal, McDonald came forward within a matter of days. *See* 432 U.S. at 390.

At all times until the class actually was certified properly, in 1979, and a notice could be mailed to all potential class members, United, as the employer, would have had better information concerning the potential scope of the class than anyone else from its employment records.[1]

II. FACTS PERTINENT TO THE CROSS-PETITION OF JOYCE BARR (NO. 83-1377).

Joyce Barr, a member of the class, has never sought to intervene formally, nor did she seek to appeal the ruling of the District Court declining to establish subclasses, of which she complains in her cross-petition.

For several years after the decision of this Court, McDonald has served as class representative. Among the proceedings at which McDonald represented the class was a hearing held in April 1981, concerning the seniority issues. In January 1982, the District Court rendered its decision, which is the subject of the appeal to, and decision by, the Seventh Circuit (717 F.2d 1140), from which McDonald is seeking certiorari (No. 83-1180). In April 1982, the District Court denied McDonald's motion for reconsideration.

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[1] United's attempt to find in prior pleadings some intention of the original named plaintiff artificially to limit the class to persons actually "fired" by it and to exclude persons forced to leave by the Iron "no-marriage" rule, was characterized by the Seventh Circuit as "[p]ettifogging about the prior pleadings," and rejected. *McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 359-360 (7th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979).

Only then, on April 26, 1982, did Barr come forward formally, and file "Suggestion for Subclassing," asking to have the class divided into persons seeking only back-pay and those seeking reinstatement as well, and to have her counsel represent the latter group. The asserted basis of Barr's position was that some class members, such as McDonald, might be more interested in back pay, and others might emphasize early reinstatement. At a hearing of April 28, 1982, Barr's "Suggestion" was opposed by United and the AFA, as well as class counsel. Counsel for Barr then disavowed any contention that class counsel had lacked vigor in seeking reinstatements with full seniority (Barr App. 4), but took the position that there was an inherent "conflict" in class counsel. Barr's attorney also indicated his disagreement with the desire of class counsel to appeal immediately the adverse ruling by the District Court as to competitive seniority.

Although Barr never sought leave to intervene, the District Court permitted her to enter an individual appearance. However, it denied her "Suggestion for Subclassing" without prejudice to its being raised again if Barr could show "conflicts in a real sense" (Barr App. 6). Barr did not seek to appeal that interlocutory ruling to the Seventh Circuit, but filed a brief in that Court raising the same contentions, which the Seventh Circuit rejected (Barr App. 1-2). Nor has she renewed her motion in the District Court.

ARGUMENT

As an applicant for review by this Court, Petitioner McDonald would have welcomed any cross-petitions which presented substantial issues reasonably related to those presented in the Petition. However, the cross-petitions filed by United Air Lines and Joyce Barr are not of that nature and we therefore oppose them. United's cross-petition merely reiterates contentions which this Court rejected previously in this very case. *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). Barr's petition seeks to present an issue of whether on the facts McDonald's representation of the class is adequate. Both Courts below, however, have found McDonald to be a most vigorous class representative. Barr's position has no merit on the facts, and seeks to inject a collateral issue of no general importance.

A. United Air Lines' Cross-Petition Should Be Denied.

United primarily contends that the granting of retroactive competitive seniority to the class is either barred by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), or is inequitable, because most members of the class did not file individual timely charges with the Equal Employment Opportunity Commission. The Court below rejected United's contention (Pet. App. 32a-35a), and that contention is unsound. *Evans* was not a class action, and as this Court subsequently noted in this very case (432 U.S. at 389 n.6):

> "6. As the opinion in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, makes clear, full relief under Title VII 'may be awarded on a class basis . . . without exhaustion of administrative procedures by the unnamed class members.' *Id.*, at 414 n.8. See also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771."

As stated in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975), the Courts of Appeals had unanimously rejected the view that each class member must file a separate EEOC complaint, and "[t]he Congress plainly ratified this construction of the Act in the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103."

To suggest that class members, although they can sue, should be deprived of relief otherwise available if they did not individually file complaints with the EEOC, clashes with this unbroken precedent, including the specific ruling by this Court in this case that "full relief" is available to such persons. If a failure to file separately had the consequences urged by United, individual class members would have to flood the EEOC with duplicative complaints, defeating the intention of Congress, contravening the purposes of class handling of disputes, and seriously burdening the machinery of the EEOC. Further, to penalize class members, without prior warning, for following a course approved by the Courts and Congress of reliance upon complaints of others, would be anything but equitable.

Other contentions of United require only brief comment. Insofar as United asserts that the class action "has hung by the thinnest of threads" or is "a hollow shell" in which class members seek a "windfall," that hyperbole is baseless. In part it merely repeats United's view that anyone whose claim relies on the fact that others have filed EEOC complaints is not a real plaintiff and lacks equities. In part it is merely caviling over prior judicial decisions adverse to, but binding upon, United, regarding class action issues. But in part it also meretriciously disparages hundreds of women by implying that anyone who has failed to become discouraged by United's success in

delaying relief for more than twelve years since the underlying practice was held invalid must be trying to gain something to which she is not entitled.[2] Such attacks are diversionary; they are not responsive to the issues on their merits.

For these reasons, and because there is no need for this Court to re-examine its prior ruling in this case, United's cross-petition should be denied.

B. Barr's Cross-Petition Should Be Denied.

The cross-petition of Joyce Barr seeks to attack, on the facts, the adequacy of Petitioner's representation of the class. Both Courts below recognized the vigor with which Liane Buix McDonald has prosecuted all aspects of this litigation on behalf of the class (Pet. App. 11a-12a; Barr App. 4). Indeed the District Court, which observed her testimony in support of the class at the reinstatement hearings, stated that Barr's contention "in the face of what we have been through flies in the face of reality" (Barr App. 4). It cannot be suggested that the mere fact that a class representative has received part of the relief she sought after the class was certified, presents a jurisdictional bar to her continued representation of the class. To the contrary, *see Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 338-339 (1980); *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 400-404 (1980); *Sosna* v. *Iowa*, 419 U.S. 393, 397-403 (1975); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 752-757 (1976).

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[2] In the District Court, United has not admitted that a single one of the flight attendants who have sworn that their departure from United's employment was due to the no-marriage rule were telling the truth. It has put every one of these women to their proof, requiring hundreds of hearings and further delaying the award of relief.

Barr's suggestion that McDonald has a "conflict of interest" is ephemeral and baseless. There is nothing "conflicting" about demanding both full seniority and maximum back pay—as Petitioner McDonald has done throughout. Barr's theorizing that at some undefined point some class members might desire to have back pay issues decided sooner while others might desire to have seniority issues decided sooner does not change this. Such matters are not even presented here; in fact McDonald has at all times taken the positions which in her counsel's judgment would result in the earliest reinstatements, with the maximum seniority, that reasonably could be sought. If every potential disagreement of a class member over litigating strategy followed by the representative rendered class representation "inadequate," there could be no such representation. Barr's counsel, although present at the reinstatement hearing, took no such position until after the District Court ruled on the reinstatement issues, and indeed after it denied rehearing. Further, he never sought to appeal from the District Court's denial of his subsequent "Suggestion for Subclassing."

As Barr's cross-petition would merely interject issues which are unimportant, confusing, and of no merit, that cross-petition also should be denied.

CONCLUSION

The cross-petitions for Writs of Certiorari of United Air Lines and Joyce Barr should be denied.

Respectfully submitted,

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